

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** June 3, 2011

Thru: Melissa Chao, Acting Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E.
Chief Engineer

Subject: Consideration of a Petition for Rulemaking

Docket No.: 2011-0779-RUL

Project No: 2011-022-PET-NR

Who Submitted the Petition:

Jed Anderson (petitioner) submitted the petition to the commission on May 16, 2011.

What the Petitioner Requests:

The petitioner requests that the commission submit Federal Clean Air Act (FCAA), §179B petitions (Section 179B petition) to the United States Environmental Protection (EPA) to revise the state implementation plan (SIP) for all ozone National Ambient Air Quality Standard (NAAQS) nonattainment areas in the State of Texas to recognize the effect of emissions originating from outside the United States (U.S.) on these nonattainment areas. Section 179B of the FCAA, 42 United States Code(USC), §7509a, provides:

Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if ... the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, *but for emissions emanating from outside of the United States* (emphasis added).

As text for the proposed rule, the petitioner provides the following language to be included in the applicable SIP once the underlying Section 179B petition is approved but does not provide language for the requested Section 179B petition:

Foreign Pollutant Transport

Based on the Commission's review of the role of international pollutant transport on domestic pollution levels in Texas, it appears that foreign pollution is impacting ozone nonattainment areas throughout the State of Texas. Such foreign pollutant influence appears to be growing and is projected to continue growing over the next 20 to 40 years.

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The Federal Clean Air Act provides that the State of Texas SIP shall be approved if “the submitting State establishes to the satisfaction of [EPA] that the implementation plan of such State would be adequate to attain [the NAAQS] . . . but for emissions emanating from outside the United States.” (42 USC § 7509a). In order to properly reflect the impacts of foreign pollution on the ability of the State of Texas to achieve attainment, and to rectify any situation where Texas citizens and businesses are paying for the cost of offsetting foreign pollution in order to attain the NAAQS, the Commission has submitted and received approval for a Section 179B petition from EPA. The modeling and control strategies in the SIP have therefore been adjusted to properly reflect the contribution from foreign pollution to the States ability to achieve the ozone NAAQS in Texas.

The petitioner also requests that, once the Section 179B petitions are approved by the EPA, the commission initiate rulemaking to address compliance issues related to foreign transport of emissions. As support for the request, the petitioner includes citations to a number of different studies regarding the global transport of air contaminants.

Recommended Action and Justification:

The executive director recommends denial of the petition for the reasons discussed below.

The petition does not meet the requirements of a Petition for Adoption of Rules pursuant to 30 Texas Administrative Code (TAC) § 20.15. The petitioner does provide “a statement of the statutory or other authority under which the proposed rule is to be promulgated,” but fails to provide meaningful or complete information regarding the “brief explanation of the proposed rule,” and the petitioner also does not provide adequate “text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the text of the current rule, if any,” as required by 30 TAC §20.15(a)(1)(B). Additionally, with respect to the “alleged injury or inequity” required by §20.15(a)(1)(D), the petitioner only makes vague assertions regarding the costs or effects of air contaminants originating outside the U.S.

The petitioner suggests a two-step process of submitting Section 179B petitions and then conducting rulemaking ostensibly regarding control strategies for emissions originating from outside the U.S. but fails to provide adequate or complete information to support either of these requests, thus meeting none of the requirements of §20.15.

The FCAA, § 179B provides that notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the EPA administrator if the plan otherwise meets all applicable requirements of the FCAA and the state satisfies the administrator that the plan would be adequate to attain and maintain the NAAQS by the attainment date, but for emissions emanating outside the U.S.

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The executive director's staff reviews information relating to the probable contribution to nonattainment or interference with maintenance for the NAAQS as part of the regularly required review post-adoption or revision of a NAAQS. The petitioner requests review of foreign transported pollution impacting ozone nonattainment in Texas. The EPA most recently revised the ozone NAAQS in 2008; however, the EPA is currently in the process of reconsidering that standard and is expected to finalize that review sometime this year (2011). Although the 2008 standard is final and effective, the EPA has not promulgated designations, implementation rules, or guidance for the 2008 standard. Thus, states are not yet required to develop attainment SIP revisions for the 2008 ozone NAAQS.

Once the EPA's reconsideration of the 2008 ozone NAAQS is complete and effective and the EPA has promulgated designations under the reconsidered standard, states will be required to develop attainment SIP revisions to assure attainment and maintenance of the final and effective ozone NAAQS, at which point the executive director will consider all factors relating to nonattainment or interference with maintenance of the ozone NAAQS, including the possible contribution of foreign transport. Any review of foreign transported pollution contribution to ozone in the state is premature at this time, since such a review must be coordinated with the complete technical review, including photochemical modeling as necessary, for attainment demonstrations required by the FCAA. Additionally, a Section 179B petition would need to be considered within the context of a SIP revision and a complete technical analysis.

Applicable Law:

- Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;
- §20.15, which provides such procedures specific to the commission;
- Texas Clean Air Act, Texas Health and Safety Code, §382.0172, provides that the commission, in developing rules and control programs to be included in a SIP for an international border area, shall ensure that the SIP meets the requirements of the FCAA, and provides additional authority that the commission may consider additional reductions outside the U.S., to the extent allowed by federal law; and
- FCAA, 42 USC, §§7401, *et.seq.*

Agency contacts:

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Attachment

Petition

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cc: Chief Clerk, 2 copies
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